

April 13, 2006

Kevin P. O'Neill, Esquire
1201 North King Street
Wilmington, DE 19801

Allison P. Texter, Esquire
Deputy Attorney General
Department of Justice
820 N. French Street, 7th floor
Wilmington, DE 19801

Re: *State of Delaware v. Joseph S. Bilik*
Case No.: 0505000080 – *Offensive Touching*

Date Submitted: April 7, 2006

Date Decided: April 13, 2006

LETTER OPINION

Dear Counsel:

A criminal restitution hearing in the above captioned matter took place on Friday, April 7, 2006 in the Court of Common Pleas. Joseph S. Bilik (the “defendant”) previously plead guilty on August 24, 2005 to one count of Offensive Touching, 11 *Del. C.* §601(a)(1). On August 24, 2005 the Court imposed a \$150.00 fine, a ten (10) day Level V sentence, suspended the same for a No-Contact Order with Francis Downs and Marlene Durose for twelve (12) months. The Court ordered a Presentence Investigation for purposes of determining restitution. Following the receipt of the Presentence Report by defense counsel, an evidentiary hearing was requested to dispute the amount recommended by the Investigative Services Office of \$3,900.99.

This is the Court' Final Order and Decision following the hearing held as reference above.

THE FACTS

At trial, Francis W. Downs ("Downs") was sworn and testified. The defendant previously resided at 717 Center Street ("the rental premises") in New Castle County and was a previous tenant of a rental property Downs managed. The defendant apparently was ordered to remove himself from the leased premises by Magistrate's Court 13 but subsequently picked a lock and entered the back door of the rental premises. The police arrived at the scene and knocked down the front door and arrested the defendant. According to Downs, the Justice of the Peace, Court 13 had ordered the defendant out of the leased premise. Downs called the police on May 1, 2005 and the police used a bar to knock out the front door in order to remove the defendant.¹

Although Downs doesn't own the property he is the Rental Manager at the request of his mother, Elizabeth Downs who resides at 421 Martin Drive in Collins Park and is an infirmed adult. Downs oversees the rentals of the property and makes all of the financial arrangements to repair and maintain the property . He received \$350.00 per month as rent prior to the defendant renting the premises. On May 10, 2005, following the incident in question, he subsequently rented the property at a reduced rate of \$250.00 per month, allegedly because of damages to the doors caused by defendant at the rental premises. Downs, however, is not seeking any diminution in rent monies as restitution.

With regards to restitution, Downs phoned approximately ten (10) companies who install rental doors and frames. Three (3) companies showed up and provided estimates. State's

¹ Pursuant to the Plea Agreement , the other subsequent misdemeanor charges were *nolle prosequi* at the request of the Attorney General.

Exhibits 1 and 2 were moved into evidence without objection and indicate one company, “Just the Best” provided an estimate of \$3,900.99, which was the lowest estimate of two bids. “P.J. Fitzpatrick” also made a bid proposal of \$4,634.00. Both proposals covered the front and back doors. The evidence at the restitution hearing indicated that the police, when they subsequently arrested the defendant, only knocked out the front door. The defendant purportedly just “picked the lock” on the rear door according to defendant’s version of the May 1, 2005 incident. Downs seeks \$3,900.99 as restitution.

The defense presented its case-in-chief.

David A. Delores (“Delores”) was sworn and testified. Five Exhibits were marked Defense identification “A – D” which depicted pictures of the rental premises in question and specifically the doors. An “X” was placed on the doors in order that the Court could determine what, if any, damages were sustained by the police entering the subject property on the date charged in the Information. Delores is familiar with Joseph Bilik and has “known him for two or three years.” He understands that Joseph Bilik originally installed the doors at the subject premises for approximately \$100.00 a piece.

Delores has been in business for approximately 15 years in the “millwork business” and also has been employed part-time at Brosius-Eliason. Delores testified these doors depicted in Defense I.D. A – D are “low-end” flat flush panel doors which cost originally \$120.00 a piece. All exhibits were then marked and received into evidence with no objection by the State.

Defense Exhibit No.: 5 was also moved into evidence without objection. It is a Brosius-Eliason estimate for a Stanley door, which is six panel, for \$357.00. According to Delores, a door knob costs approximately \$15.00 and installation by a qualified installer takes

approximately 15 minutes. To install the door it takes approximately four hours to place in the door frame and remove the old frame.

On cross-examination, Delores indicated that he was not present when the door was damaged. Further, Brosius-Eliason does not provide estimates to install doors or framing doors. Brosius-Eliason merely recommends quality craftsmen.

Delores agreed that State's Exhibits 1 and 2 are reputable licensed contractors who provided estimates.

On further cross-examination, Delores provided testimony to the Court that to install the subject doors detailed in the estimate from Brosius-Eliason provided by the defense, the doors cost approximately \$150.00 to Brosius-Eliason; they are marked up by qualified contractors to \$300.00 and there is a \$300.00 labor charge to install them. Two doors would cost approximately \$1,200.00 and one door would cost \$600.00 according to Delores. This cost would include both installation and removal of the old doors.

Joseph Bilik was sworn and testified. He plead guilty to offensive touching and reaffirmed the testimony of the defense's first witness that he bought the subject doors that were previously installed in the leased premises for \$129.00 a piece. The installation was approximately \$50.00 - \$75.00.

On the date charged in the Information, Bilik testified he heard a "boom" and the police entered the premises and removed him. He was arrested for several other misdemeanor charges which were a subsequent *nolle prosequi* by the Attorney General. There were three (3) police officers at the leased premises who knocked the door in and he was "sleepy" and had picked the lock to enter the premises to remove his belongs.

THE LAW

In *Pratt v. State*, Del. Supr., 486 A.2d 1154 (1983), the Court enunciated and articulated guidelines for the award of restitution to assist trial courts that have criminal jurisdiction. The following guidelines are used in determining restitution;

- 1) Victim Loss Statements used by the Police and/or the Presentence Office must be changed to ask for market value as opposed to replacement value or replacement costs.
- 2) Whenever possible, a Victim Loss Statement should be contemplated by the victim who must include a receipt or other verification of the Loss Statement.
- 3) A letter informing the victim the right to seek restitution must accompany the Loss Statement.
- 4) Restitution is discretionary and its imposition shall be governed by 11 *Del. C.* §4106(a).
- 5) Restitution should be ordered when the victim has suffered an actual monetary loss through personal injury, damage to, or destruction or theft of property.
- 6) Restitution should cover the victim's out-of-pocket expenses and losses as a first priority; losses covered by insurance are the lowest priority.
- 7) The defendant's ability to pay is an element to be considered in determining the amount of restitution and the schedule of payments.

See, Pratt v. State, 486 A.2 at 1161.

The State bears the burden of proving the amount of loss by a preponderance of evidence. *Benton v. State*, Del. Supr. 711 A.2d 792 (1998). It is also clear that the defendant must make restitution to a victim for the consequences of a criminal act. 11 *Del. C.* §4106(a). A plea of guilty can establish responsibility to make restitution. *See State v. Orzechowski*, 1980 W.L. 4749, *3 (Del. Fam. Ct.). Further, the amount of restitution is “not necessarily limited to the trial evidence necessary to establish guilty beyond a reasonable doubt.” *Benton v. State*, Del. Supr., 711 A.2d 792, 796 (1998).

As provided in *State v. Kathryn L. Wharton*, 1992 Del. Super., LEXIS 309 (January 16, 1992), the Court may note as follows:

In the analysis of legislative history and intent, the Delaware Supreme Court recognizes the purpose of the statute was “to make

offender's liability for restitution for property which has been lost or severely damage as a result of their crime. *Id.* at 115; *citing Report of the Adhoc Committee on Restitution* at 11 (June 1981).

In general, "there is no statutory requirement that a defendant's ability to pay be considered in determining restitution. *Pratt*, *Supra* at 1160. The Court recognizes that the Committee recommended limiting restitution when the defendant's ability to pay is in question. *Id.* at 1158. For these reasons, the Court in *Pratt* suggested the Courts follow the guidelines set forth [in *Pratt*], one of which suggested defendant's ability to pay as one element to be considered by the Court.

OPINION AND ORDER

The Court has carefully construed and weighed the evidence presented at the restitution hearing. Based upon the burden of proof, which is preponderance of evidence by the State, it is clear that the actual monetary loss sustained by the victim, who is the rental agent of the property, is \$650.00. The Court finds that \$650.00 is an appropriate measure of actual damages which the victim sustained as a result of the police being forced to enter the leased premises to arrest the defendant. The calculations are set forth above in the trial testimony but include \$300.00 for the door; \$300.00 for the installation of the door; and \$25.00 for the rear door lock, plus \$25.00 installation costs. The Court finds that the defendant is not responsible to replace the rear door; only the lock because the police entered only through the front door.

Clearly, \$650.00 is an appropriate award and represents the actual damages sustained by the victim.

A judgment is therefore entered against the defendant for \$650.00 plus post-judgment interest and costs. The defendant is ordered to pay these monies through the Criminal Clerk, who shall monitor the disbursement of these funds.

The defendant is directed to report to the Criminal Clerk's office to arrange a payment schedule. Each month, or if a lump sum is possible, the Criminal Clerk shall forward these monies directly to Francis Downs. The Court declines to award these monies through a third-party.

IT IS SO ORDERED this 13th day of April, 2006.

John K. Welch
Judge

/jb

cc: Deborah Mowbray, Clerk of the Court
CCP, Criminal Division